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Supreme Court, U.S.
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No. 02-1566

In the Supreme Court of the United States

MICHAEL D. LARIVEE,

Petitioner,

v.

THE STATE OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR RESPONDENT IN OPPOSITION

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15 pp

QUESTION PRESENTED

Does a person held in custody for driving while under the influence of drugs or alcohol have a constitutional right to an independent chemical test after refusing to take the State's required chemical test?

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STATEMENT OF THE CASE

On November 17, 2000, police officer Tim Weierke (hereinafter "Weierke") saw a car make a wide turn and subsequently fail to stop at a stop sign.[1] Weierke stopped the car and identified Petitioner as the driver.

Weierke smelled the strong odor of an alcoholic beverage on Petitioner's breath, and noticed that Petitioner's speech was slurred. Wierke also saw that Petitioner's eyes were glassy and bloodshot. Weierke asked Petitioner to get out of his car, and told Petitioner's 8 and 12 year old children to remain in the car. Petitioner proceeded to perform three field sobriety tests, all of which indicated he was under the influence of alcohol. Petitioner took a preliminary breath test, which indicated an alcohol concentration of over .10.[2] Weierke arrested Petitioner and transported him to the police department with his two children.

Prior to making the decision of whether to take the State's test, Petitioner called and spoke with his lawyer. Petitioner then refused the State's breath test and told Weierke he was refusing "Upon advise (sic) of my attorney, I don't feel like taking it." Petitioner then read from notes he had made while on the telephone with his lawyer and told Weierke: "However, I would request my own test from an individual outfit that would come out here to the jail station."

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[1] The record is based upon stipulated facts consisting of Wiereke's report, an affidavit from Scott County Jailer Kevin Nelson, and the Order from the civil Implied Consent case in Larivee v. Comm. of Public Safety, No. 2000-24039 (Scott County Dist. Ct. filed April 17, 2001) (Respondent's App. at 1).

[2] It is illegal to operate a motor vehicle in Minnesota while under the influence of alcohol, or with an alcohol concentration of .10 or more. See Minn. Stat. 169.121 (2000).

Petitioner was then driven to the Scott County Jail, where Deputy Kevin Nelson denied Petitioner's request for an independent test "because I was aware that [Petitioner] had refused Officer Weirke's test request." Petitioner was subsequently charged with DUI , Test Refusal, and one minor traffic violation.

Petitioner then challenged the civil revocation of his driver's license in Larivee v. Comm. of Public Safety, No. 2000-24039 (Scott County Dist. Ct. filed April 17, 2001) (Respondent's App. at 1). In that case, Petitioner argued that the suspension of his driver's license should be rescinded because he was denied his "right" to an independent test. Petitioner's contention was rejected, the district court ruling that Petitioner would only have the right to an independent test after submitting to the State's test. Petitioner did not appeal that decision.

Petitioner then proceeded to raise the same issue in this criminal lawsuit. The district court found that Petitioner was partially barred by collateral estoppel from re-litigating the same issue in this case, but permitted Petitioner to raise his federal constitutional arguments. The district court then found that Petitioner's federal constitutional rights were vindicated in relation to the Test Refusal count, but violated in relation to the DUI count.[3] The district court then, prior to trial, certified the case to the Minnesota Court of Appeals as "important and doubtful."

The Minnesota Court of Appeals held that collateral estoppel cannot be used by the State against a defendant for any reason in any criminal prosecution. The appellate court

[3] Petitioner's assertion that this case "was dismissed before trial" is not, therefore, correct. See Pet. at 13. Only the DUI count would have been dismissed by the district court.

then determined that Petitioner did not have a statutory or constitutional right to an independent test.

Petitioner then petitioned the Minnesota Supreme Court for discretionary review of the Court of Appeal's decision, and the State cross-petitioned. Both petitions were granted, and Minnesota's high court subsequently ruled that Petitioner did not have a statutory or constitutional right to an independent test. The Court then explained that because it found "in the state's favor on the primary issue in this case, we need not address the state's argument that the doctrine of collateral estoppel bars [Petitioner] from litigating in this criminal DUI trial a legal issue previously litigated in the implied consent proceeding...."

Petitioner then filed this petition for a writ of certiorari.

ARGUMENT

I. THERE IS A CONFLICT AMONG THE STATES, BUT NOT ON AN "IMPORTANT" FEDERAL QUESTION.

Petitioner correctly asserts that there is a conflict among the states as to whether the federal constitution requires a state to permit a DUI defendant who has refused to take the state's test to obtain an independent test while being held in custody. While at least 3 states find that there is a federal constitutional right under these circumstances,[4] at least 3 states now find that there is not.[5]

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[4] Commonwealth v. Alano, 448 N.E.2d 1122 (Mass. 1983); State v. Johnson, 208 A.2d 444 (N.J. Super. 1965); State v. Lewis, 221 S.E.2d 524 (S.C. 1976).

[5] State v. Mahoney, 515 N.W.2d 47 (Iowa Ct. App. 1994); State v. Larivee, 656 N.W.2d 226 (Minn. 2003); State v. Zoss, 360 N.W.2d 523 (S.D. 1985).

A number of additional states, though failing to specify whether relying upon the state or federal constitution, reach differing conclusions as well -- at least 9 find a constitutional violation in refusing to permit a test,[6] while at least one finds no constitutional violation.[7] Finally, at least 8 other states implicitly find that there is not a constitutional right simply by enforcing state statutes that provide there is no right to an independent test when a driver refuses the state's test.[8] So although the division may not be exactly as indicated by Petitioner, there is a division among the states on how to resolve this federal question.

To warrant Supreme Court review, however, there must be more than a mere conflict on how to resolve a federal question. The federal question itself must be "important." Respondent submits that the federal question presented in this case does not rise to the level of importance required to

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[6] Smith v. Cada, 562 P.2d 390 (Ariz. 1977); In re Martin, 374 P.2d 801 (Ca. 1962); State v. Munsey, 127 A.2d 79 (Me. 1956); Scarborough v. State, 261 So.2d 475 (Miss. 1972); State v. Snipes, 478 S.W.2d 299 (Mo. 1972); Kettering v. Baker, 328 N.E.2d 805 (Ohio 1975); Starrett v. Midwest City, 374 P.2d 777 (Okla. Crim. App. 1962); State v. Choate, 667 S.W.2d 111 (Tenn. Crim. App. 1983); Blaine v. Suess, 612 P.2d 789 (Wash. 1980).

[7] Allen v. State, 494 S.E.2d 229 (Ga. Ct. App. 1997), cert. denied (Ga. 1998).

[8] Gibson v. Troy, 481 So.2d 463 (Ala. Crim. App. 1985); McEntire v. State, 808 S.W.2d 762 (Ark. 1991); People v. Mankowski, 329 N.E.2d 266 (Ill. App. Ct. 1975); Hill v. Otte, 281 N.W.2d 811 (Ind. 1972); Commonwealth v. Minix, 3 S.W.3d 721 (Ky. 1999); People v. Einset, 405 N.W.2d 123 (Mich. Ct. App. 1986), rev. denied (Mich. 1987); McKinnen v. State, 709 S.W.2d 805 (Tex. Ct. App. 1986); State v. Johnson, 465 A.2d 1366 (Vt. 1983).

warrant review by the United States Supreme Court. The petition should be denied.[9]

II. THE MINNESOTA DECISION IS CONSISTENT WITH THIS COURT'S PRIOR DECISIONS.

A. This Case Is Governed By Brady v. Maryland, Which Was Correctly Followed By The Minnesota Supreme Court.

This case is governed by Brady v. Maryland, 373 U.S. 83 (1963), as further explained by California v. Trombetta, 467 U.S. 479 (1984) and Arizona v. Youngblood, 488 U.S. 52 (1988). The Minnesota Court correctly followed these decisions in finding that Petitioner did not have a constitutional right to an independent test in this case.

In Brady, this Court sought to ensure a defendant was not prejudiced by the State withholding evidence favorable to an accused. This Court explained that "...suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment...." Brady, 373 U.S. at 87. Later cases explained that the State's duty is to preserve only that evidence which "...might be expected to play a significant role in the suspect's defense." Trombetta, 467 U.S. at 488. To meet this standard, such "...evidence must ... possess an

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[9] If this petition is granted and the Minnesota decision reversed, this case should be remanded for consideration of the application of collateral estoppel. The Minnesota Court had granted the State's cross-petition for discretionary review on the issue of the application of collateral estoppel. The Minnesota Court did not reach the issue, however, because it decided the constitutional issue in favor of the State. Therefore if this Court were to find the constitutional issue against the State, the Minnesota Court should be given the opportunity to determine whether Petitioner should be collaterally estopped as a matter of state law.

exculpatory value that was apparent before the evidence was destroyed...." Id. at 489.

In Trombetta, for example, this Court ruled that the State's failure to preserve breath samples was not a violation of due process because the "...breath samples were much more likely to provide inculpatory than exculpatory evidence." Id. As in Trombetta, a chemical test in this case was much more likely to provide inculpatory than exculpatory evidence – Petitioner admitted drinking alcohol, had slurred speech, poor driving conduct, bloodshot eyes, and had failed all field sobriety tests and a preliminary breath test. Refusing to permit Petitioner to obtain an independent chemical test is not a constitutional violation under these facts.

Many of the cases Petitioner relies upon construe Brady in a manner inconsistent with Brady itself. Brady and its progeny address evidence whose exculpatory value is "apparent." Trombetta, 467 U.S. at 489. The cases supporting Petitioner's argument often interpret Brady to require the State to preserve evidence that "could *potentially* have supported a claim that he was innocent." State v. McNichols, 884 P.2d 620, 623 (Wash. Ct. App. 1994), rev'd 906 P.2d 329 (Wash. 1995) (emphasis added). See also State v. Swanson, 722 P.2d 1155, 1158 (Mont. 1986) (finding that a suspect has a Due Process right to gather "possible" exculpatory evidence). Even the Minnesota Supreme Court's dissent was based upon the belief that a defendant has a "...due process right to gather *possible* exculpatory evidence." Larivee, 656 N.W.2d at 233 (emphasis added). This Court has explicitly rejected such interpretations, explaining that the "possibility that the [evidence] could have exculpated respondent if preserved or tested is not enough to satisfy the standard of constitutional materiality in Trombetta." Youngblood, 488 U.S. at 56*. The test for materiality is whether the exculpatory value is "apparent." Id. at 55. Here it was not.

B. Even If This Case Falls Within the "Third Category," Petitioner Was Not Prejudiced.

Petitioner asserts that this case presents a unique question of a defendant's right to develop evidence while being held in custody, and that this Court has not previously ruled on this issue. Pet. at 8. See Trombetta, 467 U.S. at 486 ("We have, however, never squarely addressed the government's duty to take affirmative steps to preserve evidence on behalf of criminal defendants."). Even if this were the case, Petitioner suffered no prejudice because the State's burden to affirmatively aid a defendant in obtaining evidence is surely less than its burden to preserve evidence *already in its possession*.

Pursuant to Brady, the State does not have a constitutional burden to *preserve* immaterial evidence, and it therefore follows that the State does not have a constitutional burden to *gather* immaterial evidence. The Minnesota Court properly decided this case in harmony with Brady, Trombetta, and Youngblood. It is simply not a violation of due process or of a fair trial to refuse Petitioner's request for an independent test when he refused to take the State's test. See *infra* Part II (A.).

Petitioner, however, repeatedly asserts that the State deliberately, even vengefully, destroyed evidence critical to Petitioner's defense. This is a gross distortion of the facts. The State was ready, willing, and able to administer a chemical test. In fact, Petitioner was required by state law to take just such a test. See Minn. Stat. 169.121 (2000) ("It is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine...."). Instead, Petitioner refused to test, thereby rejecting the very protections provided by the statutory system.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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STATE OF MINNESOTA
COUNTY OF SCOTT

DISTRICT COURT
FIRST JUDICIAL DISTRICT

File No. 2000-24039

In re the Marriage of:

Michael David Larivee,

Petitioner,

v.

Commissioner of Public Safety,

Respondent,

ORDER AND MEMORANDUM

The above entitled matter came before the Honorable Rex D. Stacey, judge of District Court, on February 6, 2001, at the Scott County Courthouse, Shakopee, Minnesota.

Jeff Sheridan appeared on behalf of Petitioner, who was present.
Melissa Eberhart appeared on behalf of Respondent.
Based upon the proceedings, this Court makes the following:

ORDER:

1. Petitioner's motion to reinstate driving privileges is denied.

2. The attached memorandum is incorporated herein.

Dated: April 16, 2001

BY THE COURT:
s/Rex D. Stacey
Judge of District Court

MEMORANDUM

The language of Minn. Stat. § 169.123, subd. 3(a) is clear. The statute state in relevant part that the right to an independent test is allowed "in addition to any administered at the direction of the peace officer, and "...after the test administered at the direction of the peace officer..." Petitioner refused testing at the officer's request. Petitioner would only have the right to an independent test after submitting to a test at the officer's request. Therefore, the license revocation should be sustained.

RDS